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6 UNITED STATES DISTRICT COURT  
7 CENTRAL DISTRICT OF CALIFORNIA  
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10 KEN NITAO,

11 Plaintiff,

12 v.

13 PACIFIC GAS AND ELECTRIC  
14 COMPANY, et al.,

15 Defendants.

Case No. CV 16-2532-GHK (KK)

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS &  
DISMISSING PLAINTIFF'S FIRST  
AMENDED COMPLAINT WITH  
LEAVE TO AMEND

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17 I.

18 INTRODUCTION

19 Plaintiff Ken Nitao ("Plaintiff") has filed a pro se First Amended Complaint  
20 ("FAC") pursuant to Title 42 of the United States Code, section 1983. Plaintiff  
21 alleges Defendants Pacific Gas and Electric Company and Does 1 through 10  
22 violated Title 42 of the United States Code, Sections 1983 ("Section 1983") and  
23 1985(3) ("Section 1985(3)"). Defendant Pacific Gas and Electric Company  
24 ("Defendant") filed a Motion to Dismiss the FAC ("Motion"), which the Court  
25 grants for the reasons below.

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1 **II.**

2 **BACKGROUND**

3 On April 13, 2016, Plaintiff filed a civil rights complaint (“Complaint”)  
4 alleging Defendant violated (1) the Safe Drinking Water Act (“SDWA”); and (2)  
5 Plaintiff’s civil rights under Sections 1983, 1985(3), and 1986. See ECF Docket No.  
6 (“Dkt.”) 1, Compl.

7 On June 10, 2016, Plaintiff filed the FAC alleging Defendant violated  
8 Plaintiff’s civil rights under Sections 1983 and 1985(3). Dkt. 28, FAC. According  
9 to the FAC, Plaintiff owns real property in Hinkley, California. Id. at 6. Plaintiff  
10 alleges Defendant failed to remove hexavalent chromium from Hinkley’s aquifers  
11 and the aquifers have “connection via private individual water well . . . made by  
12 similarly situated Plaintiff(s).” Id. at 7. Plaintiff further alleges Defendant  
13 poisoned Hinkley’s aquifers “with URANIUM, in concentration way over 1000%,  
14 thus way over the EPA’s legal limits.” Id. at 14. Additionally, Plaintiff alleges  
15 Defendant caused the water beneath Plaintiff’s real property, “the only source of  
16 ground drinking” water to be “poisoned with ARSENIC, and URANIUM, way  
17 over the Federal and State EPA’s legal limits.” Id. at 12. Plaintiff claims to have  
18 suffered “irreparable harm health injuries as a direct result of being poisoned with  
19 toxic chemicals by Defendant’s operations.” Id. at 6.

20 In addition, Plaintiff alleges Defendant “has performed CONCERTED,  
21 I[N]TERTWINED, AND JOIN[T] ACTIVITY’S ACTION with state actors” to  
22 poison water in Hinkley. Id. at 7. Plaintiff further alleges Defendant and state  
23 actors “conspired for the purpose of depriving Plaintiff(s) of equal protection of  
24 the law and for the purpose of preventing and hindering the constituted authorities  
25 from giving and securing to Plaintiff(s) equal protection of the law and deprivation  
26 of life, liberty and property without due process of law.” Id. at 10. Plaintiff also  
27 alleges Defendant was “a willful participant in joint activity with the State or its  
28 agents” and violated Plaintiff’s “constitutional rights under color of law, in bad

1 faith, and with malicious purpose in reckless, wanton, and willful disregard of  
 2 Plaintiff(s) human, safety, and property rights.” Id. at 4, 8. Plaintiff seeks  
 3 monetary damages and costs. Id. at 16-17.

4 On June 28, 2016, Defendant filed the Motion to Dismiss the FAC. Dkt. 29-  
 5 1, Mot. Defendant argues: (1) the SDWA preempts Plaintiff’s Section 1983 and  
 6 1985(3) claims; (2) Plaintiff “alleges neither membership in a protected class nor  
 7 invidious discrimination” in the Section 1985(3) claim; (3) Plaintiff fails to allege  
 8 “he suffered injury as a result of [Defendant]’s concerted action with government  
 9 actors” in the Section 1983 claim; and (4) Plaintiff’s claims are untimely.<sup>1</sup> Id. at 2-  
 10 8. On July 12, 2016, Plaintiff filed an Opposition. Dkt. 34, Opp.; Dkt. 35, Mem.  
 11 Points & Authorities; Dkt. 36, Decl. <sup>2</sup> On July 21, 2016, Defendant filed a Reply.  
 12 Dkt. 38, Reply. This matter is thus submitted for decision.

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 19 <sup>1</sup> Because the Court finds the SDWA preempts Plaintiff’s Section 1983 and  
 20 1985(3) claims, the Court declines to address Defendant’s other arguments.

21 <sup>2</sup> Plaintiff requests the Court take judicial notice of the following documents,  
 22 presumably in support of the Opposition: (1) Holcroft v. Izbicki, 2:16-cv-00528-  
 23 DMF (D. Ariz. filed Feb. 25, 2016), Dkt. 35, Judicial Notice; (2) Holcroft v. Izbicki,  
 2:16-cv-00528-DMF (D. Ariz. filed Feb. 25, 2016), Dkt. 36, Mot. to Dismiss; (3)  
Richards v. Izbicki, 2:16-cv-00346-JCM-PAL (D. Nev. filed Feb. 16, 2016), Dkt. 38,  
 Mot. to Dismiss; and (4) Richards v. Izbicki, 2:16-cv-00346-JCM-PAL (D. Nev.  
 filed Feb. 16, 2016), Dkt. 40, Notice. Dkt. 37, Req. Judicial Notice.

24 “A court may take judicial notice of ‘matters of public record’ without  
 25 converting a motion to dismiss into a motion for summary judgment. But a court  
 26 may not take judicial notice of a fact that is ‘subject to reasonable dispute.’” Lee v.  
City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (internal citations omitted);  
 27 see also Fed. R. Evid. 201(b). As an initial matter, Plaintiff fails to explain what the  
 28 documents would prove if the Court granted the request for judicial notice. See  
 Dkt. 37, Req. Judicial Notice. Further, to the extent Plaintiff seeks to prove the  
 facts asserted in the documents, such facts are subject to reasonable dispute. See  
Lee, 250 F.3d at 689. Accordingly, the Court DENIES Plaintiff’s Request for  
 Judicial Notice without prejudice.

1 III.

2 **LEGAL STANDARD**

3 A complaint may be dismissed for failure to state a claim pursuant to Federal  
 4 Rule of Civil Procedure 12(b)(6) “where there is no cognizable legal theory or an  
 5 absence of sufficient facts alleged to support a cognizable legal theory.” Zamani v.  
 6 Carnes, 491 F.3d 990, 996 (9th Cir. 2007) (citation and internal quotation marks  
 7 omitted). In considering whether a complaint states a claim, a court must accept as  
 8 true all of the material factual allegations in it. Hamilton v. Brown, 630 F.3d 889,  
 9 892-93 (9th Cir. 2011). However, the Court need not accept as true “allegations  
 10 that are merely conclusory, unwarranted deductions of fact, or unreasonable  
 11 inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)  
 12 (citation and internal quotation marks omitted).

13 Although a complaint need not include detailed factual allegations, it “must  
 14 contain sufficient factual matter, accepted as true, to state a claim to relief that is  
 15 plausible on its face.” Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011)  
 16 (citation and internal quotation marks omitted). A claim is facially plausible when  
 17 it “allows the court to draw the reasonable inference that the defendant is liable for  
 18 the misconduct alleged.” Id. (citation and internal quotation marks omitted). The  
 19 complaint “must contain sufficient allegations of underlying facts to give fair notice  
 20 and to enable the opposing party to defend itself effectively.” Starr v. Baca, 652  
 21 F.3d 1202, 1216 (9th Cir. 2011).

22 “A document filed pro se is to be liberally construed, and a pro se complaint,  
 23 however inartfully pleaded, must be held to less stringent standards than formal  
 24 pleadings drafted by lawyers.” Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir.  
 25 2008) (citations and internal quotation marks omitted). The Court has “an  
 26 obligation where the petitioner is pro se, particularly in civil rights cases, to  
 27 construe the pleadings liberally and to afford the petitioner the benefit of any  
 28 doubt.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and internal

quotation marks omitted). If, however, a court finds that a pro se complaint has failed to state a claim, dismissal may be with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000).

#### IV.

### DISCUSSION

## **THE SDWA PREEMPTS PLAINTIFF'S CIVIL RIGHTS CLAIMS UNDER SECTIONS 1983 AND 1985(3)**

### **A. STATUTORY PREEMPTION GENERALLY**

In determining whether a statute preempts a Section 1983 claim, “[t]he crucial consideration is what Congress intended.” City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 120, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005).

“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.” Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

Additionally, where Congress enacts a statute containing “an express, private means of redress in the statute itself,” the Court must infer “Congress did not intend to leave open a more expansive remedy under § 1983.” Abrams, 544 U.S. at 121; see Middlesex Cty. Sewerage Auth., 453 U.S. at 20 (“It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions.”). Similarly, a statute preempts a Section 1985(3) claim where Congress expresses intent for the statute to preempt the claim. Great Am. Fed. Sav. & Loan Ass’n v. Novotny, 442 U.S. 366, 375-76, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979) (holding Title VII preempted a Section 1985(3) claim because “[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law”).

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1 **B. SDWA PREEMPTION**

2 Here, the SDWA establishes “national primary drinking water regulations,”  
 3 which “shall apply to each public water system in each State.” 42 U.S.C. § 300g.  
 4 The SDWA requires the Environmental Protection Agency Administrator  
 5 (“Administrator”) to “publish maximum contaminant level goals and promulgate,  
 6 by rule, national primary drinking water regulations” *Id.* § 300g-1. The SDWA  
 7 further establishes “an elaborate enforcement scheme,” including that the  
 8 Administrator may bring a civil action to compel SDWA compliance orders against  
 9 violators of the SDWA. *Mattoon v. City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992)  
 10 (citing 42 U.S.C. § 300g-3(b), (g)(1)). In addition, citizens may initiate  
 11 enforcement proceedings against SDWA violators and the Administrator for failure  
 12 to perform any non-discretionary duty under the SDWA. 42 U.S.C. § 300j-8.

13 The SDWA’s establishment of an “express, private means of redress”  
 14 demonstrates Congress did not intend to leave open a more expansive remedy”  
 15 under Section 1983 or 1985(3). *See Abrams*, 544 U.S. at 121. Hence, “the SDWA  
 16 evinces a clear congressional intention to entrust the regulation of public drinking  
 17 water systems to an expert regulatory agency rather than the courts.” *Mattoon*,  
 18 980 F.2d at 4-5. Accordingly, the SDWA preempts all other forms of federal relief  
 19 for SDWA violations – including claims under Sections 1983 and 1985(3). *Id.* at 4  
 20 (“We have little hesitation in concluding that Congress occupied the field of public  
 21 drinking water regulation with its enactment of the SDWA.”); *see Ford v.*  
 22 *California*, No. 1:10-CV-00696-AWI, 2013 WL 1320807, at \*3 (E.D. Cal. Apr. 2,  
 23 2013) (“The SDWA preempts all other forms of federal relief for a violation of the  
 24 SDWA, including . . . Section 1983 Constitutional right claims.”); *Boler v. Early*,  
 25 No. 16-10323, 2016 WL 1573272, at \*3 (E.D. Mich. Apr. 19, 2016) (holding the  
 26 SDWA preempts claims under Sections 1983 and 1985(3)).

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1 **C. APPLICATION**

2 Here, Plaintiff alleges Defendant poisoned the water beneath Plaintiff's real  
 3 property, "the only source of ground drinking" water. Dkt. 28, FAC at 12.  
 4 Plaintiff alleges Defendant injected uranium and arsenic "way over the Federal and  
 5 State EPA's legal limits" into Plaintiff's groundwater. *Id.* However, the SDWA  
 6 preempts Plaintiff's claims under Sections 1983 and 1985(3). *See Mattoon*, 980  
 7 F.2d at 4; *Ford*, 2013 WL 1320807, at \*3; *Boler*, 2016 WL 1573272, at \*3. In fact,  
 8 the SDWA specifically regulates the precise harm Plaintiff alleges – contaminants  
 9 in public water systems that fail to comply "with any national primary drinking  
 10 water regulation or may otherwise adversely affect the health of persons." 42  
 11 U.S.C. § 300h. Hence, because Congress intended the SDWA to govern  
 12 compliance "with any national primary drinking water regulation," the SDWA  
 13 preempts Plaintiff's Section 1983 and 1985(3) claims. *See id.*

14 Plaintiff argues the SDWA has no preemptive effect on the Section 1983 or  
 15 1985(3) claims because "[t]his action ha[s] nothing to do with 'citizens suit' nor  
 16 with Safe Drinking Water Act." Dkt. 28, FAC at 6. However, merely omitting  
 17 nominal reference to the SDWA does not change the fact that the SDWA preempts  
 18 the substance of Plaintiff's civil rights claims. *See Zombro v. Baltimore City Police*  
 19 *Dep't*, 868 F.2d 1364, 1366 (4th Cir. 1989) (finding the Age Discrimination in  
 20 Employment Act preempted plaintiff's civil rights claims, even where plaintiff  
 21 declined to bring his action under the Age Discrimination in Employment Act). If  
 22 the Court allowed Plaintiff to enforce the SDWA behind a Section 1983 or 1985(3)  
 23 cloak, Plaintiff could sidestep Congress' intent to require Plaintiff give notice to  
 24 prospective defendants of their allegedly unlawful conduct and provide prospective  
 25 defendants sixty-days to address their error. *See* 40 C.F.R. § 135.12; *see also Great*  
 26 *Am. Fed. Sav. & Loan Ass'n*, 442 U.S. at 376 (finding Title VII preempted Section  
 27 1985(3) claim because if not, "complainant could completely bypass the  
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1 administrative process, which plays such a crucial role in the scheme established by  
2 Congress in Title VII”).

3 Plaintiff also argues the SDWA has no preemptive effect on the Section 1983  
4 or 1985(3) claims because Defendant allegedly poisoned a private well and the  
5 SDWA “is only applicable to Public Water System and not to Private Domestic  
6 Water Well of the Plaintiff who is not Public Water System owners and/or  
7 operators.” E.g., Dkt. 34, Opp. at 6. However, while the SDWA regulates only  
8 “public water systems,” the SDWA defines a “public water system” as a system  
9 that has “at least fifteen service connections or regularly serves at least twenty-five  
10 individuals.” 42 U.S.C. § 300f.<sup>3</sup> Because Plaintiff alleges Defendant poisoned  
11 underground water in an aquifer with “25 connections” to “the Public Water  
12 System,” Plaintiff has conceded the aquifer is a “public water system” within the  
13 scope of the SDWA. Dkt. 34, Opp. at 5.

14 Accordingly, the SDWA preempts Plaintiff’s civil rights claims under  
15 Sections 1983 and 1985(3), and Plaintiff’s Section 1983 and 1985(3) claims must be  
16 dismissed. See Mattoon, 980 F.2d at 4.

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27 <sup>3</sup> Further, a legislative report states the SDWA regulates any “public water  
28 system . . . regardless of whether the system is publicly or privately owned or  
operated.” H.R. Rep. No. 93-1185 at 16 (1974).



V.

**ORDER**

Therefore, the Court ORDERS as follows:

Defendant's Motion to Dismiss the FAC is GRANTED. In light of Plaintiff's pro se status and because it is unclear whether leave to amend would be futile, the Court DISMISSES the FAC with leave to amend. See Lopez, 203 F.3d at 1126-30.

Within **twenty-one (21) days** of this order, Plaintiff must act according to one of the following options:

**1. PLAINTIFF MAY FILE A SECOND AMENDED COMPLAINT**

If Plaintiff chooses to file a Second Amended Complaint, Plaintiff must clearly designate on the face of the document that it is the "Second Amended Complaint," it must bear the docket number assigned to this case, and it must be retyped or rewritten in its entirety. Plaintiff shall not include new defendants or new allegations that are not reasonably related to the claims asserted in the FAC. In addition, the Second Amended Complaint must be complete without reference to the Complaint, FAC, or any other pleading, attachment, or document. Plaintiff must comply with Central District of California Local Rules.

An amended complaint supersedes the preceding complaint. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will treat all preceding complaints as nonexistent. Id. Because the Court grants Plaintiff leave to amend as to all claims raised here, any claim raised in a preceding complaint is waived if it is not raised again in the Second Amended Complaint. Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012).

The Court warns Plaintiff that it generally will not be well-disposed toward another dismissal with leave to amend if Plaintiff files a Second Amended Complaint that continues to include claims on which relief cannot be granted. The Court has already granted Plaintiff opportunities to state claims and identified

Plaintiff's pleading deficiencies. "[A] district court's discretion over amendments is especially broad 'where the court has already given a plaintiff one or more opportunities to amend his complaint.'" Ismail v. County of Orange, 917 F. Supp.2d 1060, 1066 (C.D. Cal. 2012) (citations omitted); see also Ferdik, 963 F.2d at 1261. Thus, if Plaintiff files a Second Amended Complaint without claims on which relief can be granted, the Second Amended Complaint will be dismissed without leave to amend and with prejudice. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996) (denial of leave to amend is not an abuse of discretion where further amendment would be futile); see also Robinson v. California Bd. of Prison Terms, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot, state a claim containing an arguable basis in law, this action should be dismissed without leave to amend; any amendment would be futile.") (internal citations omitted).

Plaintiff is explicitly cautioned that failure to timely file a Second Amended Complaint will result in this action being dismissed for failure to prosecute and/or obey Court orders pursuant to Federal Rule of Civil Procedure 41(b).

## **2. PLAINTIFF MAY VOLUNTARILY DISMISS THIS CASE**

Alternatively, Plaintiff may request voluntary dismissal of this case. Fed. R. Civ. P. 41(a). If Plaintiff chooses this option, this action will be dismissed in its entirety without prejudice. **The Clerk of Court is directed to mail Plaintiff a blank Notice of Dismissal Form.**

Dated: August 04, 2016




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HONORABLE KENLY KIYA KATO  
United States Magistrate Judge